



Chris Chown  
Department for Business, Energy & Industrial Strategy

Sent by email only to:  
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12 February 2021

Dear Mr Chown

**Exemptions from the Requirement for an Electricity Licence Call for Evidence ('Call for Evidence')**

We refer to the above Call for Evidence.

Since your online response form is not well suited to a response from an organisation such as ours, we would like this letter to be taken as our response.

We confirm that we are happy for our response to be published.

To the extent relevant, we try to cover as many of the sections of questioning in your online form, as well as covering others that we believe are very relevant and should also be taken into account in any subsequent amendment of the class exemptions regime and/or related policy development.

**1. About Lux Nova and why we are responding**

Lux Nova Partners is a clean energy law firm, specialising in supporting the transition to 'net zero' energy systems.

We have significant experience advising clients on the Electricity Act 1989, as amended (the '**Act**') and class exemptions from the licensing requirements of the Act ('**Class Exemptions**') under the Electricity (Class Exemptions from the Requirement for a Licence) Order 2001, as amended (the '**Class Exemptions Order**'), particularly in respect of our clients contributing to the Government's drive towards net zero energy production.

**Our response directly addresses only the Class Exemptions** rather than individual exemptions, though some of our broader reasoning will be equally applicable to both systems of exemption.

**Transition to net zero**

We advise clients who find themselves with no realistic option other than to make use of the Class Exemptions to avoid participation in a licensing regime which involves risks, costs and complexities

which businesses of their scale cannot cope with. Such businesses include carbon saving combined heat and power plants (particularly in the field of district heating and industrial energy efficiency), solar PV systems, wind farms (including smaller scale ones) and energy storage; and now, as smaller energy schemes become more relevant to involving consumer participation and flexible and smart electricity generation and supply are needed to deliver reliable zero carbon electricity, peer to peer arrangements involving the local community.

**These are energy businesses and energy systems that:**

- **increase the provision of clean energy generation, distribution, storage and supply, and improve energy efficiency and demand management, contributing to the Government's zero carbon strategy;**
- **lend themselves to much wider public and community participation and engagement in the UK energy system; and**
- **lead to innovation, investment and job creation.**

However, the Class Exemptions Order upon which such businesses rely is famously ambiguous in many areas, and frequently misunderstood, causing clients many difficulties. The drafting of the Order and delineation of the exemptions would certainly benefit from improvement, even aside from the wider questions which we raise in this letter.

It is important to emphasise that **the costs, risks and complexities of holding an Electricity Act licence is the real reason for the Class Exemptions being needed.** It is widely recognised that **this barrier stifles innovation and also puts Great Britain at a disadvantage to some other jurisdictions.** The Class Exemptions are, and have always been, a sticking plaster to address a major market distortion created through regulatory design and which, despite prior attempts to do so, has not been satisfactorily resolved.

It follows that **removing the Class Exemptions would seriously hamper the Government's zero carbon objectives,** given the existing and potential role of these activities in the electricity sector which, in themselves, may be relatively small scale but, collectively, may be huge. At the same time, the need to rely on such Class Exemptions is anomalous, inflexible and far from the optimal solution to the problem of market access that lies at the root of their use.

We therefore see it as **important that the Class Exemptions be maintained in their scope in a clarified and more easily understood form.** In our view, rather than extend their scope, **we believe access for licence exempt suppliers to regulated local distribution systems should be improved,** both to enhance consumer choice and to enable smaller scale zero carbon electricity generators and suppliers to realise the potential of their businesses. We discuss this further below.

#### The Regulations -the risks of ambiguity and drafting complexity

We are far from alone amongst lawyers who have advised numerous clients who, simply because of the ambiguities and drafting complexities of the Class Exemptions, have inadvertently supplied or distributed electricity beyond their scope or may have been captured by or fall outside these regulations in a way that was not intended. The result is that, without intending to, parties relying on the Class Exemptions may unwittingly be committing a criminal offence.

## Risk for advisors

The risk also extends to professional advisors who themselves are challenged by the need to resolve the ambiguities and drafting anomalies in the course of advising their clients and who may not fully appreciate the risk that they face professionally and personally of criminal liability in certain circumstances.

We expand on each of the above areas in our response.

## **2 The Class Exemptions are needed – but they can be better integrated into the market system**

As indicated earlier in this letter, the complexity and costs of compliance with complex rules of the licensing and market systems mean that the business models of smaller operators are very unlikely to be commercially viable were they to have to operate under the same rules as the largest market participants. Thus, there is the necessity of the Class Exemptions. However, we see scope for reforming the supply licensing system in particular, both to enhance the contribution that smaller licence exempt suppliers and generators can make to the Government's zero carbon objectives, to enhance and better protect consumer choice and to create more green jobs.

Specifically, licence exempt supply is, in practice, largely confined to supply through private wires. **There is no easily accessible mechanism whereby a licence exempt generator can provide a licence exempt supply to consumers using a licensed distribution system.** It is possible to achieve something close to this, principally through 'sleeving', but this requires reaching agreement with a licensed supplier to supply the licence exempt power over a licensed distribution system to named consumers agreed with the generator. For the few that offer this, it involves a negotiation between unequal parties. There is no service available to the licence exempt generator, whereby a licensed supplier simply provides the service of transportation, enabling the supply itself to be undertaken by the licence exempt supplier.

We suggest that **licensed suppliers above a certain threshold should be obliged under their licence conditions to provide such transportation service** at cost (including, of course, recovering use of system charges).

There are advantages to enabling licence exempt suppliers to supply directly to their consumers more widely in this way:

1. There are substantial advantages to consumers, in that they would retain their ability to change suppliers and benefit from the competitive market between differing business models more readily than is possible at present.
2. It would benefit the market, by enabling small scale suppliers of electricity to join the market more readily, enhancing competition.

Although, under most circumstances, third party access for suppliers to private wires is mandatory, it is in practice of very limited use to small consumers.

### 3. The fair apportionment of policy and network costs

As a result of Ofgem's targeted charging review, embedded benefits (that embedded generators were increasingly relying on) have been very substantially reduced in value. The regulator's rationale behind this reduction is that residual transmission charges and some other costs are costs that relate to the maintenance of what is, in essence, a universal service provided by the electricity market system and infrastructure. On that basis, all should contribute pro-rata to such costs, save insofar as any particular segment of the market can show that its activities save on those costs.

In principle, that is a fair view to take but it only takes into account one business model. The survival and development of mainstream, transmission-connected generation and supply businesses is dependent upon the maintenance of the "level playing field" that Ofgem is seeking to protect.

However, different business models derive different value from and contribute different value to the electricity market and infrastructure systems. For example, the point has been made during the review of embedded benefits that directly connected generating capacity that supplies consumers locally may normally neither energise nor draw energy from the transmission system. It may do at times but, in general, it derives less value from and imposes less cost on the functioning of the transmission system than a large-scale generator, all of whose output energises the transmission system and whose business model is entirely dependent upon it.

That is not to say that distributed generators should not pay *any* contribution to the residual costs of transmission, but **it is distortive of the market and a serious impediment to their business model if the charge distributed generators are obliged to pay is disproportionate to the value their business obtains from the system.**

It is a fair view that the review of embedded benefits has not taken sufficient account of this and the review of the apportionment of fair shares of policy and network costs really must certainly do much better.

The same principle applies to any review of the apportionment of policy or network costs that might flow from this Call for Evidence on the Class Exemptions.

### 4. The policy backdrop to the Call for Evidence

The Call for Evidence refers to the backdrop in which a review of the Class Exemptions Order is being undertaken. This being a world which has moved on since the Class Exemptions Order (and the Electricity Act) were first written. There has been a significant increase in distributed generation. There is more electricity storage on the system and a greater uptake of electric vehicles is anticipated. Successive Governments have made pledges (including a number enshrined in law) to decarbonise our energy systems.

However, the reality is that there is a very substantial contribution that the distributed energy sector can make towards decarbonisation. Securing the future and growth of the important

contribution it can make to the Government's zero carbon objectives depends upon two important market conditions:

1. that the costs and burdens that the sector bears are proportionate *and respect the differing business models arising in these innovative sectors* (including in the context of market complexities licence exempt status), but at the same time –
2. the distributed generation sector and its related supply businesses are not separated from the rest of the market, but consumers in particular have access to both and retain options to choose.

For this reason, we are advocating that the Secretary of State accepts four principles in respect of the review of the existing Class Exemptions:

1. **The Class Exemptions are retained, for the reasons explained in paragraph 1 above.**
2. **The drafting of the Class Exemptions is carefully reviewed to remove current anomalies and lack of clarity. We set out in the Appendix examples that we see as needing attention.**
3. **The Secretary of State pursues the suggestion set out in paragraph 2 above regarding enabling access by licence exempt suppliers to licensed distribution systems.**
4. **That, in determining whether licence exempt generators and suppliers are paying their fair share of policy and network costs, he should take fully into account that for innovative business models to develop and their potential to be realised, such costs must be apportioned fairly, taking into account the need to create a level playing field for all business models, in the absence of which the development of productive, innovative, low carbon business models in this sector will be severely impeded (see paragraph 3 above).**

## 5. Changing the Class Exemptions Order

Many businesses already operate some electricity generation, distribution or supply activity, benefitting from exemption from the requirement to hold a licence by virtue of the current Class Exemptions Order. Others are currently planning relevant activity based on their current understanding of the Class Exemptions Order.

*Narrowing the Class Exemptions should be avoided*

For any business currently operating under a Class Exemption, narrowing or removing that Class Exemption would have the effect of *criminalising* a previously lawful activity. Therefore, at an absolute minimum, any change to the Class Exemptions Order **must allow existing activities to continue lawfully - effectively grandfathering existing exemptions.**

For those currently planning (or, potentially, currently in the process of implementing) an electricity generation, distribution or supply activity under a Class Exemption, narrowing or removing a Class Exemption relevant to them could make their activity unviable. Since they may have already invested significant time and money in developing the activity, at an absolute minimum, any change to the Class Exemptions Order **must be announced sufficiently far in advance to give fair warning to future projects and should grandfather rules for projects already in development.**

### *Extending the Class Exemptions*

Beyond our recommendation above of securing better access for licence exempt supply over licensed distribution systems, and our urging that further efforts should be made to simplify the market and licensing regime for smaller players, we would not generally advocate any extension of the reach of the Class Exemptions. However, some minor extension is implicit in the clarifications suggested in this letter.

## **6. Eliminating ambiguity and unnecessary drafting complexity**

As explained in paragraph 1, the current Class Exemption Order contains significant ambiguities and drafting complexities which have impeded its implementation within the industry.

We set out below in the Appendix some observations on ambiguities and difficulties of interpretation which we have encountered in the course of advising on licence exempt projects. It contains examples and is not an exhaustive list.

We would welcome further engagement with you on these issues.

Yours sincerely



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## Appendix – Examples of ambiguities and difficulties of interpretation in the Class Exemption Order

### 1. Class A – Small Generators

The table below sets out a number of headline observations about some of the ambiguities in respect of the Class A generation exemption. This is not an exhaustive list.

Class exemption (actual wording)	Interpretation and ambiguity or restriction created	Suggestion
<p><b>Schedule 2, Class A: Small generators</b></p> <p><i>“Persons (other than licensed generators) who do not at any time provide more electrical power from any one generating station than—</i></p> <p><i>(1) 10 megawatts; or</i></p> <p><i>(2) 50 megawatts in the case of a generating station with a declared net capacity of less than 100 megawatts;</i></p> <p><i>disregarding—</i></p> <p><i>(a) power supplied to—</i></p> <p><i>(i) a single consumer who occupies premises which are on the same site as the premises where the generating station is situated and who consumes all the power provided to him from that generating station at those premises or supplies all or some of such power in circumstances specified in the description of Class B in Schedule 4 and consumes at those premises any of such power not so supplied by him; or</i></p> <p><i>(ii) two or more consumers who form a qualifying group each of whom occupies premises which are on the same site as the premises where the generating station is situated and consumes all the power provided to him from that generating station at those premises or supplies all or some of such power in circumstances specified in the description of Class B in Schedule 4 and consumes at those premises any of such power not so supplied by him; and</i></p> <p><i>(b) for the purposes of paragraph (2) above power temporarily provided in excess of 50 megawatts due to technical circumstances outside the reasonable control of the person providing that power.”</i></p>	<p>There are 2 key qualifying criteria for exempt generation –</p> <ul style="list-style-type: none"> <li>• provision of 10MW or less; or</li> <li>• provision of 50 MW or less from a generating station of less than 100MW, disregarding power supplied on site on the basis specified in the exemption.</li> </ul> <p>Excluded from this ‘provision’ is power consumed on the same site (subject to further limitations).</p> <p>Under what circumstances is the first criterion (10MW) not satisfied by the second (50MW)? Does it mean that the 10MW criterion applies to generating stations over 100MW?</p>	<p>Clarification would be useful.</p>

## 2. Distribution exemptions

The table below sets out a number of headline observations about some of the ambiguities in respect of the Class A, B and C distribution exemptions. This is not an exhaustive list.

Schedule 3 Class A: Small distributors		
<p><i>“Persons (other than licensed distributors) who do not at any time distribute more electrical power than 2.5 megawatts for the purpose of giving a supply to domestic consumers or enabling a supply to be so given with that electrical power.</i></p> <p><i>A.1. For the purposes of Class A electrical power distributed by a body corporate, which is associated with, connected to or related to any distributor and which does not fall within Class B below, shall be treated as distributed by that distributor.”</i></p>	<p>It is perfectly clear that, if domestic consumers are connected <u>within</u> a distribution network, not more than 2.5MW of domestic supply can be made or enabled to them over that network and that the limit applies across a corporate group.</p> <p>However, it is not completely clear how this exemption applies where distribution networks are connected to one another.</p> <p>So, where a generator is embedded in a network (network A), does the embedded generator’s export <i>from</i> network A onto a licensed distribution network mean that network A is used for the purpose of giving or enabling a supply to domestic consumers on the licensed network? We assume not but this is not beyond doubt.</p> <p>And, if there is another network, owned/operated by someone else, that is embedded within network A and it has domestic customers connected to it, is network A used for the purpose of giving or enabling a supply to domestic customers? We assume it is but this is not beyond doubt. But it may be beneficial to clarify that enabling via another network is not caught.</p> <p>Also, it is unclear whether distribution for commercial consumption is permitted under this exemption.</p>	<p>Clarification would be useful.</p>
Schedule 3 Class B: On-site distribution		
<p><i>“Persons (other than licensed distributors) who do not at any time distribute from any distribution system more electrical power than one megawatt for the purpose of giving a supply to domestic consumers or enabling a supply to be so given with that electrical power provided that each domestic</i></p>	<p>Permits the distribution of electricity to domestic consumers provided the electricity is the output of an embedded generating station and does not exceed 1 MW.</p> <p>The only exception is in respect of ‘standby</p>	<p>Clarification would be useful.</p> <p>For this exemption to work reliably, it needs <i>explicitly</i> to allow a</p>



<p><i>consumer receives the electrical power, disregarding stand-by electrical power, from a generating station embedded in the same distribution system as himself.</i></p> <p><i>B.1 For the purposes of Class B “stand-by electrical power” means electricity supplied periodically or intermittently to a person to make good any shortfall in the availability of electricity to that person from its own generation for the purposes of its supply of electricity to domestic consumers seeking such supply, where such shortfall arises from the generating station being wholly or partly out of commission for a temporary period.”</i></p>	<p><i>electrical power’.</i> As defined, this permits top-up to the level of the generating plant’s output capability, but it appears not to permit import above the generating capacity of the generating station, even if the total respects the 1MW limit. If this is correct, it makes the exemption impractical to use in many circumstances.</p> <p>In addition, it is unclear whether distribution for commercial consumption is permitted under this exemption.</p> <p>Yet, the 1MW limit on enabled domestic supply suggests an intention to work together with the Class B and C supply exemptions.</p> <p>See further on the Class C distribution exemption for mixed domestic and commercial networks.</p>	<p>combination of on-site generated and imported electricity, so long as the 1MW limit domestic supply is respected.</p> <p>Direct reference could be made to the Class B and C supply exemptions (although care should be taken not to preclude direct licensed supply over the network).</p>
<p><b>Schedule 3 Class C: Distribution to non-domestic consumers</b></p>		
<p><i>“Persons (other than licensed distributors) who do not at any time distribute electrical power for the purpose of giving a supply to domestic consumers or enabling a supply to be so given with that electrical power.”</i></p>	<p>This exemption is commonly relied on for purely commercial situations. However, by setting the domestic consumption limit at zero, the operators of private networks on complex sites can easily and unwittingly find themselves falling foul of the exemption if even a single domestic connection is made somewhere downstream of them.</p> <p>Under the parallel Class B and C supply exemptions, licence exempt suppliers can supply both domestic and non-domestic consumers through the same private wires, with volume limits applied separately to the two types of consumer. The current wording therefore potentially makes the exemption unusable in many circumstances, regardless of parallel supply licence exemptions operating in the same circumstances.</p>	<p>Clarification and rationalisation of the Class B and C distribution licence exemptions would be useful. This could include combining them into a single exemption which permits mixed domestic and commercial consumption to be enabled so long as the 1MW domestic consumption limit is respected.</p>

### 3. Supply exemptions

The table below sets out a number of headline observations about some of the ambiguities in respect of the Class A, B and C supply exemptions. This is not an exhaustive list.

Schedule 4 Class A: Small suppliers		
<p><i>“Persons (other than licensed suppliers) who do not supply any electricity except electricity which they generate themselves and who do not at any time supply more electrical power than 5 megawatts of which not more than 2.5 megawatts is supplied to domestic consumers.</i></p> <p><i>A.1. For the purposes of Class A electrical power supplied by a body corporate which is associated with any supplier shall be treated as supplied by that supplier.”</i></p>	<p>This is an overall exemption for individual small generator-suppliers. It is not replicable on separate sites because of the aggregation across a corporate group. It permits up to 5MW of supply, no more than 2.5MW of which can be to domestic consumers.</p> <p>By providing that it only applies to persons who ‘do not supply any electricity except electricity which they generate themselves’, a Class A exempt supplier cannot themselves supply top up or standby suppliers sourced from elsewhere. In most situations, this renders the exemption unusable for on-site supply situations and only usable for off-site supply.</p> <p>Use for off-site supply is currently difficult to achieve in practice because of the commercial arrangements that would need to be put in place to enable it to work. Wheeling agreements are no longer generally available although efforts are being made to construct new commercial arrangements. These are themselves beset with complications including the basis on which a licensed supplier assisting the Class A exempt supplier to reach off-site customers itself then needs to interact with its customers and the basis on which it transacts electricity through the various industry agreements.</p>	<p>Consider how to facilitate the use of Class A supply for off-site use. For example, this could be by way of a mandated wheeling arrangement. See paragraph 2 in our letter</p>
Schedule 4 Class B: Resale		
<p><i>“Persons (other than licensed suppliers) who—</i>  <i>(1) do not supply any electricity except—</i>  <i>(a) electricity which is supplied to their premises by—</i>  <i>(i) a licensed supplier; or</i>  <i>(ii) by a person in circumstances such that he falls within Class C in</i></p>	<p>This permits the resale of electricity where the electricity is supplied to the re-seller’s premises by:</p> <ul style="list-style-type: none"> <li>• a licensed supplier; or</li> <li>• another licence exempt supplier who is supplying the re-seller using one of the on-site or private wire</li> </ul>	<p>Clarification would be useful.</p> <p>Remove the 10% limit on re-sale of received Class C supplies.</p>

<p><i>this Schedule (in this Class referred to as a "Class C supplier") provided that for the purpose of determining for the purpose of this Class and paragraphs B.1 and B.2 below whether a person is supplying electricity in such circumstances paragraph (2)(a), (b), (c), (d) and (e) in Class C in this Schedule shall have effect as if sub-paragraph (ii) and the preceding "and", in each case, were omitted; or</i></p> <p><i>(b) electricity which they generate themselves or which is supplied to them by a person authorised by an exemption to supply electricity when—</i></p> <p><i>(i) the supply of electricity which is normally available to them from a licensed supplier or a Class C supplier (their "normal supply") is interrupted temporarily due to circumstances outside their control; or</i></p> <p><i>(ii) the plant or equipment which is used to generate electricity for the purpose of giving their normal supply is being tested; and</i></p> <p><i>(2) to the extent that they supply Class C electricity— (a) supply such electricity only to premises, which are on the same site as the relevant premises; and (b) comply with all the conditions set out in paragraph B. 2 below.</i></p> <p><i>B.1. For the purposes of Class B—</i></p> <p><i>"Class C electricity" means electricity which is supplied by a person in circumstances such that he falls within Class C in this Schedule;</i></p> <p><i>"relevant premises", in relation to any reference to a supplier falling or seeking to fall within Class B, means the premises from which he supplies that electricity; and</i></p> <p><i>"year" means a period of twelve months running from 1st April to 31st March.</i></p> <p><i>B.2. The conditions referred to in paragraph (2) in Class B are as follows.</i></p> <p><i>(1) In respect of each relevant premises the supplier must not in the previous year have supplied from those relevant premises an amount of Class C electricity which is more than 10 per cent of the Class C electricity supplied in that year to those relevant premises.</i></p> <p><i>(2) If during a year the supplier starts to supply Class C electricity from any particular relevant premises for the first time, at the time he starts to make such supplies he must reasonably expect that the total amount of Class C</i></p>	<p>exemptions available under Class C (see below); or</p> <ul style="list-style-type: none"> <li>• which they generate themselves or is supplied by another license exempt supplier when the supply from their regular licence supplier or Class C exempt supplier is interrupted.</li> </ul> <p>There is also a restriction on the amount of Class C electricity which the re-seller can re-sell. They are not permitted to re-sell more than 10% of the volume of electricity supplied to them under a Class C exemption.</p> <p>The 10% limit is arbitrary and can cause unnecessary difficulties for entirely legitimate businesses.</p> <p>The Class B exemption recognises "normal supply" from a licensed supplier and/or Class C exempt supplier and, in exceptional circumstances, the possibility of supply from another exempt supplier. This exceptional wording is blind to the exemption they are relying on. In this emergency situation, the exempt supplier is likely to be supplying 100% of the power. However, if the exceptional supplier is also a Class C exempt supplier, it appears that the 10% restriction on Class C supply still applies. This seems to mean that only Class A can be relied on. However, if that was the intention, it would surely be drafted in that way. Therefore, it seems excluding Class C emergency supply was not intended.</p> <p>Further, the Class B supply exemption does not permit (nor do any of the other supply exemptions permit) the further resale of electricity supplied by a Class B exempt supplier. In our experience, this is perhaps one of the most frequently overlooked breaches, repeated innumerable times up and down the country. Examples include industrial parks and multi-let buildings where units are let, sub-let and further sub-sub-let. Ownership and metering arrangements may be complicated but, essentially, may nest distribution networks within distribution networks and (unless there is</p>	<p>Permit layered on-on-supply, etc.</p> <p>On sale from a Class B resale should be permitted, certainly on the same site or premises</p>
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<p>electricity supplied by him during the remainder of that year from those premises will be no more than 10 per cent. of the Class C electricity supplied in that year to those relevant premises.</p> <p>(3) In respect of each relevant premises the supplier must not in any year supply from those relevant premises more than 250 megawatt hours of Class C electricity to domestic consumers.</p> <p>B.3. A supplier shall not, if and to the extent that it would lead to his falling outside Class B, be treated as supplying Class C electricity to any premises during a year in which the relevant premises are being supplied with electricity by licensed suppliers, unless he supplies more electricity in that year than the amount of electricity which is supplied to those relevant premises by licensed suppliers in that year.”</p>	<p>direct licensed supply) may have multiple layers of re-sale on top of resale on top of re-sale, etc.</p>	
<p><b>Schedule 4 Class C: On-site supply</b></p>		
<p>“Persons (other than licensed suppliers) who—</p> <p>(1) do not supply any electricity except—</p> <p style="padding-left: 20px;">(a) electricity which they generate themselves; or</p> <p style="padding-left: 20px;">(b) electricity which they generate themselves together with electricity which is supplied to them by a licensed supplier; and</p> <p>(2) provide the output of each generating station at which they generate electricity only to—</p> <p style="padding-left: 20px;">(a) one consumer who—</p> <p style="padding-left: 40px;">(i) occupies premises which are on the same site as the premises where the generating station is situated; and</p> <p style="padding-left: 40px;">(ii) consumes all the electricity provided to him by the supplier in question at those premises other than any of that electricity supplied by that consumer in circumstances such that he falls within Class B in this Schedule;</p> <p style="padding-left: 20px;">(in this Class referred to as a “single consumer”) or</p> <p style="padding-left: 20px;">(b) two or more consumers who form a qualifying group each of whom—</p> <p style="padding-left: 40px;">(i) occupies premises which are on the same site as the premises where the generating station is situated; and</p> <p style="padding-left: 40px;">(ii) consumes all the electricity provided to him by the supplier in question at those premises other than any of that electricity supplied by that consumer in circumstances such that he falls within Class B in this Schedule;</p> <p style="padding-left: 20px;">(in this Class referred to as an “on-site qualifying group”)</p>	<p>The Class C exemption permits up to 100MW of certain types of supply, unlimited amounts of other supply but not more than 1MW of domestic supply. The Class C exemption is widely relied on for embedded generation and supply scenarios on a licence exempt basis.</p> <p>The first limb of qualification (origin of electricity) under Class C is relatively straightforward to understand.</p> <p>The use made of that electricity is then subject to a highly convoluted set of further consumer classifications. Most of these consumer groups are then subject to further qualification by reference to the definition of “private wire” (which potentially requires enquiry into property ownership, boundaries and use to apply it) and/or “same site” (which potentially requires similarly complex investigation of property ownership and land use) and/or corporate relationships (which could require a supplier to undertake convulsed corporate due diligence).</p> <p>“Private wire” is a commonly used (and misused) term given its narrow legal meaning. Indeed, the gap between common use and legal definition can give rise to inadvertent criminal breach. Similarly, “same site” has a different legal</p>	<p>Clarification would be useful.</p> <p>Radical simplification could usefully be made to the categories of eligible customer types. There seems little justification now to make it any more complicated that saying non-domestic and domestic are permitted and applying a domestic threshold.</p> <p>Simplification along these lines would avoid the need to resolve the misalignment of “qualifying group” with current Companies Act definitions.</p> <p>“Same site” and “private wire” need aligning with the much broader, common understanding of what each means.</p>

or

(c) one or more consumers who—

(i) each occupy premises which are—

(aa) on the same site as the premises where the generating station is situated; or

(bb) not on the same site but which receive the electricity supply from that generating station over private wires; and

(ii) each of whom consumes all the electricity provided to him by the supplier in question at those premises other than any of that electricity supplied by that consumer in circumstances such that he falls within Class B in this Schedule;

(each in this Class referred to as an “additional group consumer”)

where the total maximum amount of electrical power supplied to those additional group consumers at any time is 100 megawatts of which not more than one megawatt is supplied to domestic consumers; or

(d) one consumer who—

(i) receives at least a third of the output of that generating station at premises he occupies which are—

(aa) on the same site as the premises where the generating station is situated; or

(bb) not on the same site but which receive the electricity supply from that generating station over private wires; and

(ii) consumes all the electricity provided to him by the supplier in question at premises he occupies other than any of that electricity supplied by that consumer in circumstances such that he falls within Class B in this Schedule;

(in this Class referred to as a “remote consumer”); or

(e) two or more consumers who form a qualifying group—

(i) who between them receive at least a third of the output of that generating station at premises they occupy which are—

(aa) on the same site as the

meaning than common understanding. The corporate relationships have not been updated to follow evolution of the Companies Act. In each case, there is no obvious policy justification for the narrower legal meanings given in the Class Exemptions Order or for thereby criminalising activity that inadvertently fails strictly to meet the narrow legal definitions of the Class Exemptions Order.

A further category of “remote” consumer or qualifying group is provided for, where two thirds of the output of a generating station need be neither on the “same site” nor connected by “private wire”. Similarly, where “same site” is not on “private wire” means supply over a licensed network. These off-site supply arrangements suffer the same challenges as off-site supplies under the Class A supply exemption. See paragraph 1 of our letter.

Class C justifies heavy re-drafting to introduce much needed clarity.

*premises where the generating station is situated; or*

*(bb) not on the same site but which receive the electricity supply from that generating station over private wires; and*

*(ii) each of whom consumes all the electricity provided to him by the supplier in question at premises he occupies other than any of that electricity supplied by that consumer in circumstances such that he falls within Class B in this Schedule;*

*(in this Class referred to as a "remote qualifying group") or*

*(f) additional group consumers within the 100 megawatt limit and one of the following—*

- (i) a single consumer;*
- (ii) an on-site qualifying group;*
- (iii) a remote consumer; or*
- (iv) a remote qualifying group; or*

*(g) (i) a single consumer, or an on-site qualifying group, or additional group consumers within the 100 megawatt limit, or a remote consumer, or a remote qualifying group, or a mixed group of consumers of a type described in sub-paragraph (f) above; and*

*(ii) any other person in circumstances where the provision of the output of the generating station in question does not amount to the supply of electricity.*

*C.1. The following provisions have effect for the purposes of Class C.*

*(1) Where at any time the supplier in question and some other person generate electricity at the same generating station or provide the output of the same generating station, the generation of electricity by that other person or the provision of the output of that generating station by that other person shall be treated as the generation of electricity and the provision of the output of that generating station respectively by that supplier if that other person, being a body corporate, is associated with that supplier.*

*(2) Two or more generating sets which are operated by the same person or by bodies corporate which are associated with each other shall be treated as a single generating station if they are on the same site as each other (whether or not there is an electrical interconnection between any of them) but otherwise shall be treated as separate generating stations, and in this sub-paragraph—*

(a) "generating set" means a combination of the plant and equipment that produces electricity and any other plant or equipment by which that plant or equipment is driven; and

(b) generating sets shall be treated as being on the same site as each other if they are—

(i) situated on the same premises as each other;

(ii) situated on premises which are immediately adjoining each other; or

(iii) situated on premises which are separated from each other only by a road, railway or watercourse or by other premises occupied by the supplier in question or by a body corporate which is an associate of that supplier.

C.2. In Class C—

"additional group consumers within the 100 megawatt limit" means consumers described in paragraph (2)(c) in Class C;

"output" in relation to a generating station means the electricity generated at that generating station other than electricity consumed by the plant; and

"private wires" in relation to a generating station means electric lines owned by—

(a) the supplier in question;

(b) a consumer who receives a supply from the supplier in question from the generating station;

(c) the owner, lessor or lessee of the generating station or of one of the premises to which a supply is made by the supplier in question; or

(d) any of the persons described in paragraphs (a) to (c) above jointly with any other of the persons described in those paragraphs;

provided that the owner of those wires is not a licensed distributor."

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Article 2(2)(e) defines "same site":

(e) Premises shall be treated as on the same site as each other if they are—

(i) the same premises;

(ii) immediately adjoining each other; or

(iii) separated from each other only by a road, railway or

<p><i>watercourse or by other premises occupied by the consumer in question, by any other person who together with that consumer forms a qualifying group, or by the person seeking to fall within the class in question specified in Schedule 2 or 4.</i></p>		
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#### 4. Are suppliers ever deemed to be generating electricity when in fact they are not?

We are aware of arguments based on Regulation 2(2)(d) of the Class Exemptions Order that extend the scope of the generation and supply licence exemptions. Whether or not we agree with those arguments, the fact that we know they have been raised suggests they may be relied on by some.

Class exemption (actual wording)	Interpretation and ambiguity or restriction created	Suggestion
<p><b>Regulation 2(2)(d)</b></p>		
<p><i>A person shall be treated as generating electricity at any time if he is the operator of plant or equipment which at that time—</i></p> <p><i>(i) is generating or capable of generating electricity; or</i></p> <p><i>(ii) is not capable of generating electricity only by reason of the maintenance, repair or testing of the plant or equipment.</i></p>	<p>This has been interpreted by some to deem a generator to be generating even when they are not so long as they are capable of generating electricity. In the context of the generation exemptions, this makes sense. They continue to be treated as a generator even if they are temporarily not generating.</p> <p>However, this argument has also been used in the context of supply exemptions. If a Class C generator-supplier is virtually always deemed to be generating, then everything they supply can be on-supplied under Class B. This seems to ignore the existence of other qualifications on Class B and C supplies but is a view firmly held by some.</p>	<p>Clarification would be useful.</p>

#### 5. Criminal offences and their implications for advisors

Breach of the Electricity Act, including by virtue of relying on but falling outside a Class Exemption, is a criminal offence. As far as we are aware, there is little or no enforcement of breaches for falling outside of the Class Exemptions. This can encourage a cynical approach by anyone who may be caught within the scope of the Class Exemptions.

From an advisor's perspective, however, things are rather different. Money earned through the commission of an offence and costs avoided by not taking steps to avoid commission of an offence are potentially proceeds of crime for the purpose of the Proceeds of Crime Act 2002 (POCA). The



POCA rules are part of a set of rules to prevent criminal activity and money laundering and involve professional advisors to help fight crime. Professional advisors including lawyers and financial advisors have a professional duty to report proceeds of crime in certain circumstances. Failure to do so (for example, when coming across them in the course of a transaction), can lead to a prosecution and even jail sentence for the advisor.

In the context of breach of the Electricity Act, failure strictly to meet the requirements of the Class Exemptions Order can happen because the operator was simply unaware of the rules, was unable to make sense of the rules or interpreted the rules in the wrong way. Yet these are not matters that seem to have any policy justification for criminalising. That may explain the very low level of enforcement.

However, and perversely, the sanctions that could be taken against a professional advisor are actually stricter than those that could be taken against a company committing the underlying offence. Enforcement action can be taken against the advisor even if no enforcement action is taken against the operator who has breached the Electricity Act.

In light of the above, this absurd position could easily be resolved by downgrading these low-level Electricity Act breaches from criminal to civil matters. That may also have the added benefit of making enforcement of blatant breaches easier.

**Lux Nova Partners, 12 February 2021**